No. 78-411

In the Supreme Court of the United States

OCTOBER TERM, 1978

INTERSTATE COMMERCE COMMISSION,
Petitioner,

vs.

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, THE UNITED STATES OF AMERICA, et al.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF OF RESPONDENTS CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY, ET AL., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 1a(6)(a) of the Interstate Commerce Act (49 U.S.C. §1a(6)(a)) authorizes the Interstate Commerce Commission, after it has found that a proposed abandon-

* This Brief in Opposition is submitted on behalf of Railroad Respondents Chicago and North Western Transportation Company, the other common carriers by railroad listed in Attachment A to this Brief (p. a-1 *infra*), and the Association of American Railroads.

ment of a line of railroad or discontinuance of service would be consistent with the "public convenience and necessity," to postpone the issuance of a certificate authorizing the abandonment or discontinuance, but only for a "reasonable time, not to exceed 6 months." During that "reasonable time, not to exceed 6 months," a railroad and a potential subsidizer may negotiate for continuation of rail service under a subsidy agreement. The question presented is whether the Commission may postpone the issuance of a certificate for a period greater than six months by "reopening" the proceeding leading to the order which initially authorized the abandonment or discontinuance if the railroad and the potential subsidizer do not reach agreement on a subsidy for continued service.

STATEMENT

The Interstate Commerce Commission's Petition for Writ of Certiorari seeks review by this Court as to only one part of the decision of the Court of Appeals on an issue of statutory interpretation—whether the phrase "not to exceed 6 months," as it appears in Section 1a(6)(a) of the Interstate Commerce Act, means what it says. The Court of Appeals unanimously ruled that the Commission's regulation authorizing "reopening" of an abandonment proceeding and postponement of the issuance of an abandonment certificate for more than six months (49 C.F.R. § 1121.38(i)(2)(ii)) is in violation of the language of the statute and the statute's legislative history. (Appendix to Petition, App. 8a-11a). The Commission does *not* seek review of the remainder (and largest part) of the Court of Appeals' decision. With respect to the single issue as to which review is sought, no other court has decided that issue, and accordingly there is no conflict between the decision below and the decision of any other court. Nor does

the portion of the decision sought to be reviewed interfere in any way with the Commission's exercise of its responsibilities under the Act. The Petition thus presents no substantial question worthy of review by this Court.

Section 1a of the Interstate Commerce Act

As a part of its effort to reform the regulation of the nation's railroads in the aftermath of the collapse of the Penn Central and other Northeastern railroads, Congress in 1976 enacted new statutory provisions governing the abandonment of lines of railroad and the discontinuance of service over such lines in the Railroad Revitalization and Regulatory Reform Act ("4-R Act"). These provisions—contained in new Section 1a of the Interstate Commerce Act (App. 37a-43a)—establish a detailed framework and procedure to govern the abandonment of railroad lines and the discontinuance of service over such lines. This framework is divided into two distinct stages.

The first stage consists of detailed Commission procedures for reaching a determination as to whether or not a proposed abandonment or discontinuance would serve "the present or future public convenience and necessity" (Section 1a(1)). Under these procedures the rights of shippers and the public generally are fully protected. Paragraph 1 of Section 1a provides that no railroad may abandon any line or discontinue service without first obtaining a certificate from the Commission declaring that "the present or future public convenience and necessity require or permit such abandonment or discontinuance."[1] (App. 37a.)

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[1] Applications for such certificates, together with notices of intent to abandon, must be submitted to the Commission not less than 60 days prior to the date of the proposed abandonment or discontinuance (Section 1a(1), App. 37a).

Paragraph (2) requires a carrier to publish and otherwise give notice to interested parties of its intent to abandon a line or discontinue service. (App. 37a-38a.) Following such notice, the Commission is authorized (paragraph (3)) to institute an investigation of the proposed abandonment or discontinuance. If no investigation is ordered, the Commission "shall issue" a certificate of abandonment or discontinuance at the end of the 60 days. If an investigation is ordered, the Commission "shall" postpone the effective date of the abandonment or discontinuance "for such reasonable period of time as is necessary to complete such investigation."[2] (App. 38a-39a.) Paragraph (4) provides that if the Commission does not conduct an investigation, the abandonment or discontinuance may occur 30 days after the certificate of convenience and necessity is issued. If the Commission does conduct and conclude an investigation, then it has three alternatives. It may issue the certificate without conditions. It may issue the certificate with modifications or subject to such terms and conditions as the Commission finds are appropriate. Or it may refuse to issue the certificate.[3] (App. 39a.)

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[2] The "burden of proof as to public convenience and necessity" is placed upon the applicant for the certificate (Paragraph (3), App. 39a).

[3] Paragraph (5) requires each railroad to publish a full diagram of the railroad, including a description of each line which is "potentially subject to abandonment," and also identifying lines as to which the railroad plans to submit an application for a certificate of abandonment or discontinuance. Paragraph (5) further provides that the Commission shall not issue a certificate authorizing abandonment or discontinuance if such abandonment or discontinuance is opposed by a significant user of the line or by a State or political subdivision unless the line of railroad involved had been "identified and described" in a diagram submitted at least 4 months prior to the submission of the application for the certificate. (App. 39a-40a.)

If the Commission finds that the proposed abandonment or discontinuance is consistent with the public convenience and necessity and therefore decides to issue the certificate, and if a potential subsidizer makes an offer of financial assistance, proceedings then enter a second stage in which the Commission must decide whether to postpone issuance of the certificate. Paragraph (6) (App. 40a-41a) empowers the Commission to postpone issuance of the certificate for a "reasonable time, not to exceed 6 months" to permit the railroad and a user or unit of government to negotiate with respect to a financial assistance or purchase agreement under which continued operations over the rail line would be preserved.

Paragraph (6) provides that if the Commission finds "that the public convenience and necessity permit the abandonment or discontinuance of a line or railroad," it may "postpone" issuance of the certificate. Such postponement may be granted only if, within 30 days of publication of its finding, the Commission further finds that "a financially responsible person," such as a shipper or governmental entity, has offered financial assistance in the form of "a rail service continuation payment" which "is likely" to cover (a) the difference between the revenues attributable to the line and the "avoidable cost of providing rail freight service on such line, together with a reasonable return on the value of such line," or (b) the acquisition cost of any portion of such line. (App. 40a-41a.)

If the Commission concludes that these conditions are met, it shall postpone issuance of the certificate for a "reasonable time, *not to exceed 6 months*" (paragraph (6), App. 41a; emphasis supplied). The purpose of this limited postponement is to permit negotiations between the railroad and any "financially responsible person" with respect to possible financial assistance or purchase agree-

ment to provide for "continued operation of rail services over such line." The railroad is required to make available to parties considering offering financial assistance reports on the physical condition of the line, and also on traffic, revenue, and other pertinent data.

If a financial assistance agreement is concluded, then the Commission is directed to "postpone" issuance of the certificate for the period during which the agreement is in effect. If, after a "reasonable time, not to exceed 6 months," no such agreement has been concluded, then the certificate shall issue, and the railroad may proceed with the abandonment or discontinuance.

The Commission's Order and Regulations Promulgated Pursuant to Section 1a

Shortly after enactment of the 4-R Act, the Commission issued a notice of proposed rulemaking and accompanying draft regulations governing abandonment and discontinuance of rail service (Notice of July 30, 1976, published in the Federal Register at 41 Fed. Reg. 31878 (1976)). The public was given an opportunity to participate in the proceeding through submission of written initial and reply statements. The Association of American Railroads submitted initial and reply statements on behalf of its railroad members, and certain railroads submitted separate statements of their own views. The United States Department of Transportation and other interested parties also submitted statements.

The Commission, by order served November 5, 1976 (dated October 29, 1976), adopted the regulations governing abandonments and discontinuances (codified as Part 1121 of Title 49, Code of Federal Regulations) (App. 50a). Only one subsection of these regulations—subsection (ii) of Section 1121.38(i)(2)—is involved in the Petition for

Certiorari (*see* Petition for Certiorari, p. 8 n.5). The Commission's report containing the Commission's reasons for adoption of the regulations was served on November 10, 1976 (dated November 5, 1976) (App. 50a).[4]

The Commission's regulations contained, *inter alia*, provisions asserting power in the Commission to postpone the issuance of an abandonment certificate beyond the expiration of the six-month period specified in Section 1a(6)(a). These regulations purported to provide four alternative options for the Commission in the event that a railroad and a potential subsidizer did not reach a subsidy agreement during the 6-month period provided by Section 1a(6)(a) (49 C.F.R. §1121.38(i)(2); Petition for Certiorari, pp. 3-4):

> (i) to issue a certificate;
>
> (ii) to "Reopen the underlying abandonment or discontinuance proceeding to reevaluate the application on its merits in light of the financial assistance offer;"
>
> (iii) to "Direct the carrier to continue to provide rail freight service for an additional year . . ." or
>
> (iv) to take other "appropriate" action, which may include "setting the matter for arbitration subject to the final review of the Commission."

Railroad Respondents objected to alternatives (ii), (iii), and (iv) on the grounds that those alternatives would permit postponement of the issuance of a certificate beyond the

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[4] Chicago and North Western Transportation Company, the United States Department of Transportation, and others filed petitions asking the Commission to reconsider the regulations which it had adopted. On May 3, 1977, the Commission served a report and order (dated April 21, 1977) making a few minor revisions in its regulations and incorporating these revisions into the regulations (App. 99a).

six-month period, and were therefore contrary to the express terms of paragraph (6) of Section 1a.

The Decision of the Court of Appeals

After the promulgation of the Commission's regulations, Railroad Respondents herein sought review of portions of the regulations in the United States Court of Appeals for the Seventh Circuit.

Although the United States of America was named as a Respondent as required by law (*see* 28 U.S.C. §2344), the United States, acting through the Department of Justice, urged the Court of Appeals to set aside the portions of the Commission's regulations purporting to authorize postponement of an abandonment certificate for more than six months (App. 9a).

A panel of the Court of Appeals, consisting of Chief Judge Fairchild and Circuit Judges Sprecher and Tone, heard oral argument on September 12, 1977, and rendered an opinion and judgment on May 30, 1978. The Court, in an opinion by Circuit Judge Tone, held unanimously that the portions of the Commission's regulations which purported to authorize the Commission to "[r]eopen the underlying abandonment or discontinuance proceeding," to direct a railroad "to provide rail service for an additional year," or to take other "appropriate" action were contrary to Paragraph 6 of Section 1a and hence invalid (App. 8a-11a). The Court of Appeals sustained other portions of the Commission's regulations against independent challenges by the Commonwealth of Pennsylvania and certain railway labor organizations (App. 27a-32a). It invalidated and ordered reconsideration of certain other aspects of the

regulations challenged by Railroad Respondents (App. 11a-27a).[5]

In an effort to persuade the Court of Appeals to change its decision, the Commission—again acting independently of the Department of Justice—filed a Petition for Rehearing and Suggestion of Rehearing *En Banc*. After considering this Petition, the Court of Appeals unanimously declined to reconsider its ruling that the Commission lacked power to postpone the issuance of an abandonment certificate beyond the six-month period provided by Section 1a (6)(a) (App. 47a).[6]

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[5] Judge Sprecher dissented from one portion of the Court of Appeals' rulings on these matters (App. 33a-35a). The Commission does not seek review of the rulings of the Court of Appeals with respect to these other issues raised by Railroad Respondents below. Indeed, the Commission advised the Court of Appeals that it intends "to conform its practices to the Court's decision to the fullest extent that it can practicably do so" with the single exception of the issue presented by the instant Petition for Certiorari (Response of the Interstate Commerce Commission to Petitioners' Motion For Issuance of Mandate, filed with the Court of Appeals, served September 30, 1978, p. 4).

[6] No judge of the Court of Appeals requested rehearing *en banc* as to this or any other issue. However, the panel of the Court of Appeals which had heard argument granted the Commission's Petition for Rehearing as to another issue (having to do with cost determination) and issued an amended opinion (with Judge Sprecher not participating) upholding a portion of the Commission's regulations which it had held invalid in its previous opinion (App. 45a-47a).

The Petition For A Writ of Certiorari

The Commission's Petition for Writ of Certiorari, filed independently of the Solicitor General (Petition for Certiorari, p. 2 n.2), seeks review of only one aspect of the judgment of the Court of Appeals—the holding that the Commission may not postpone for more than six months the issuance of an abandonment certificate by "reopening" the proceeding which led to the decision to authorize the abandonment (Subsection (ii) of Section 1121.38(i)(2); see Petition for Certiorari p. 8 n.5). The Commission does *not* seek review of the Court of Appeals' ruling that subsections (iii) and (iv) of Section 1121.38(i)(2) (also asserting power to postpone the issuance of an abandonment certificate beyond the statutory six-month period) (*see* pp. 7-8, *supra*) were invalid.[7]

[7] Indeed, the Commission has advised the Court of Appeals that it "has no intention of invoking the provisions of its regulations that purport to authorize it (1) to direct a carrier to continue to provide rail freight service for a year after expiration of the six-month negotiation period or (2) to take other 'appropriate' action including setting the subsidy issue for arbitration" (Response of the Interstate Commerce Commission to Petitioners' Motion For Issuance of Mandate, filed with the Court of Appeals, served September 30, 1978, p. 4).

ARGUMENT

The Commission's Petition for Writ of Certiorari discloses no ground under Rule 19(1)(b) of this Court's rules for issuing a writ of certiorari. The ruling of the Court of Appeals was clearly correct and is supported by the position taken by the United States Department of Transportation in the rulemaking proceedings before the Commission and by the United States Department of Justice before the Court of Appeals. Moreover, the arguments advanced by the Commission with regard to the merits of the statutory issue presented are so far at variance with the language of Section 1(a)(6)(a), the legislative history of the statute, and traditional principles of statutory construction, that they provide no basis for the Commission's position as to that issue.

1. The Commission's attempt to justify the one portion of its regulations as to which it still seeks review overlooks the simple, and central, fact that Congress expressly provided that issuance of an abandonment certificate could not be postponed beyond the expiration of the six-month period provided in Section 1a(6)(a). As the Court of Appeals held (App. 9a):

> "Paragraph (6) of §1a states that the postponement of the issuance of a certificate is 'not to exceed 6 months.' We do not know how Congress could have made it any plainer."

The Court of Appeals' construction of Section 1a(6)(a) is plainly correct. This Court has consistently held that in reviewing agency action, a court is not bound by the

agency's misconstruction of a statute, but instead construes the statute for itself (*Volkswagenwerk Aktiengesellschaft* v. *Federal Maritime Commission*, 390 U.S. 261, 272 (1968)):

> "[T]he courts are the final authorities on issues of statutory construction, *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385, and 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the Congressional policy underlying a statute.' *N.L.R.B.* v. *Brown*, 380 U.S. 278, 291."

The significance which Congress attached to this 6-month limitation is underscored by a comparison of the terms of Section 1a(6)(a) with the terms of other paragraphs of Section 1a and the provisions of other statutes under which the Commission had authority to postpone the abandonment of railroad lines. Elsewhere in Section 1a Congress granted the Commission authority to postpone the otherwise automatic issuance of an abandonment certificate "for such reasonable period of time as is necessary" to complete an investigation of the proposed abandonment (Section 1a(3) (App. 38a)). As the Court of Appeals noted, Congress' decision *not* to impose a six-month deadline on the completion of such investigation demonstrates that the time limitation "not to exceed 6 months" set forth in Section 1a(6)(a) was intended to have significance (App. 9a-10a).

Moreover, the 6-month limitation in Section 1a(6)(a) represents a deliberate departure from previous legislation dealing with railroad abandonments. Congress had earlier provided in the Regional Rail Reorganization Act of 1973 that lines of railroad subject to that Act but not included for transfer in the Final System Plan could not be abandoned if a potential subsidizer made an offer of a subsidy which

covered the avoidable costs of operating the line.[8] By contrast, in Section 1a(6)(a), added in 1976 in the 4-R Act, Congress provided that issuance of a certificate authorizing abandonment could be postponed only for a "reasonable time, not to exceed 6 months." This new provision clearly reflects Congress' decision to balance the interests of potential subsidizers and the national rail system differently than in the 1973 Act by placing a limit on the time for which a railroad could be compelled to continue branch line service after the Commission had found that abandonment was in the public interest.[9] The very different procedure under the 1973 Act was recognized in the 4-R Act

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[8] The 1973 Act provided that "[n]o rail service may be discontinued and no rail properties may be abandoned" where a shipper or the potential subsidizer offered a "continuation subsidy" which covered "the difference between the revenue attributable to such rail properties and the avoidable costs of providing service on such rail properties plus a reasonable return on the value of such rail properties," or offered to purchase such properties (Section 304(c)).

[9] The incorporation of the 6-month limit in Section 1a(6)(a) was intended to accomplish a change from the pattern established in the 1973 Act. At least two proposed bills—neither of which was enacted—would have permitted the Commission to order a railroad to continue service beyond the period of negotiations if no financial assistance agreement had been concluded. H.R. 12891 (93d Cong., 2d Sess.) (the Transportation Improvement Act of 1974) would have authorized the Commission to "order continued operation of the line thereafter on the condition that the subsidy is provided" (H.R. 12891, Section 1(23)). Likewise, H.R. 7681 (94th Cong., 1st Sess.) (the Railroad Revitalization Act of 1975) would have directed the Commission to "order continued operation of the line thereafter on the condition that the subsidy is provided" (H.R. 7681, Section 1(23)). Both of these proposed bills failed of enactment, and the provisions which would have authorized the Commission to order continued service beyond the period of financial assistance negotiations were *not* incorporated in the 4-R Act.

itself[10] and, as the Court of Appeals noted (App. 11a), confirms that the 6-month limitation in Section 1a should be given effect.

2. The express terms of Section 1a(6)(a) are reinforced by the legislative history of that Section. As the Commission itself recognizes (Petition, p. 9), the specific provisions of Section 1a reflect a clear purpose on the part of Congress "to improve the economic health of the railroads by mitigating their financial losses from branch line service." Although Congress was concerned to provide communities and shippers an opportunity to negotiate for continued service over lines which could be abandoned consistent with the public interest, it intended to limit the Commission's power to postpone the issuance of an abandonment certificate. Congress knew that the Commission's abandonment proceedings had often extended for years, during which

[10] In the 4-R Act, Congress enacted certain amendments to the 1973 Act giving the Commission authority "to take whatever action is appropriate to ensure" that railroads comply with the temporary requirements governing compulsory continuation of service on branch lines in the Northeast. S. Rep. No. 94-595, 94th Cong., 2d Sess. 143 (1976). As thus amended, the 1973 Act provides that Conrail or any other railroad designated by a potential subsidizer to provide service on a branch line subject to the 1973 Act may refuse to enter into a financial assistance agreement only if the Commission finds "that the agreement would substantially impair such railroad's ability to serve adequately its own patrons or to meet its outstanding common carrier obligations" (Section 304(d)(1), 45 U.S.C. §744(d)(1)). The amendments also give the Commission authority to order rail service by a designated carrier or trustee of a railroad in reorganization where a subsidy offer has been made, but not accepted, and to determine the compensation for such directed service (Section 304(d)(3), 45 U.S.C. §744(d)(3)). Congress in the 4-R Act thus conferred plenary authority upon the Commission to compel continuation of branch line service in the Northeast. However, it rejected this approach in enacting Section 1a of the 4-R Act, which contains no such mandatory provisions.

the railroads had been compelled to continue to incur losses on branch line operations. Hearings on Surface Transportation Legislation Before the Senate Subcommittee on Surface Transportation, 92nd Cong., 1st Sess. 170 (1972). The Senate Committee which recommended enactment of the 4-R Act expressly acknowledged that one of the railroad industry's principal obstacles was "the regulatory climate [which] constrained management's ability to . . . abandon obsolete properties and lines." S. Rep. No. 94-499, 94th Cong., 1st Sess. 3 (1975).

The Court of Appeals correctly held that although "the provisions for subsidization were intended to provide a reasonable opportunity for the salvaging of service" (App. 11a):

> "What is a reasonable time, however, was for Congress to decide in light of its apparent determination to grant relief from the prolonged administrative proceedings that had attended abandonment and discontinuance."

In Section 1a Congress thus balanced the competing interests of communities and the national transportation system by permitting postponement of the issuance of a certificate, but only for a "reasonable" period, "not to exceed 6 months."[11]

[11] Such time limits reflecting Congressional balancing of competing interests are found elsewhere in the Interstate Commerce Act and have been enforced by this Court. For example, Section 15(7) of the Interstate Commerce Act provides that carrier-initiated rates may be suspended by the Commission "but not for a longer period than seven months . . . ." (49 U.S.C. §15(7)). In *Arrow Transportation Co.* v. *Southern Ry.*, 372 U.S. 658, 664-669 (1963), this Court specifically ruled that the provisions of Section 15(7) limiting the Commission's power to suspend proposed carrier-initiated rates to no more than seven months were the result of a Congressional balancing of railroad and shipper interests, and that this express legislative balance could not lawfully be upset by the courts. See also *Minnesota* v. *United States*, 238 F. Supp. 107, 111-112 (D. Minn. 1965).

The Commission's effort to upset a Congressional balancing of competing interests embodied in a statutory time limit is strikingly similar to a practice of the Securities and Exchange Commission which this Court held invalid last term in *Securities and Exchange Commission* v. *Sloan*, ... U.S. ....., 56 L. Ed.2d 148 (1978). Although Section 12(k) of the Securities Exchange Act of 1934 authorizes the SEC to suspend trading in a listed security summarily only "for a period not exceeding ten days," the SEC had suspended trading in listed securities for much longer periods through the artifice of issuing new summary suspension orders at the expiration of each ten-day period. This Court held that "the language of the statute" was "persuasive in and of itself" that no such power to expand the ten-day period existed (56 L. Ed.2d at 157), and noted that there was in any event an "absence of any truly persuasive legislative history to support the Commission's view and [that] the entire statutory scheme suggest[s] that in fact the Commission is not so empowered" (*id.* at 164). Here, as in *Sloan*, the language of Section 1a(6)(a) is clear and unambiguous. Furthermore, as in *Sloan*, the Commission has failed to cite a shred of legislative history indicating that Congress intended in effect to nullify a clear limitation on the Commission's authority to postpone issuance of a certificate.

3. The Commission expressly concedes in its Petition that reopening an abandonment proceeding at the end of six months could "have the *effect* of postponing the issuance of a certificate" beyond the 6-month period (Petition, p. 12). The Commission nevertheless seeks to justify its effort to circumvent the plain language of Section 1a(6)(a) prohibiting such a postponement by reference to Section 17(9)(g) of the Interstate Commerce Act (49 U.S.C. § 17(9)(g)) which authorizes the Commission to reopen a proceeding "on grounds of material error, new evidence, or

substantially changed circumstances." This argument ignores a fundamental feature of the abandonment process established by Section 1a.

The inability of a railroad and potential subsidizer to reach a subsidy agreement during the 6-month period (following a Commission finding that abandonment or discontinuance is consistent with the public convenience and necessity) is not, and *could not be*, a "changed circumstance" within the meaning of Section 17(9)(g) of the Act. The railroad and the shipper or political subdivision would not have previously been in any position to reach an agreement on financial assistance; and a Commission decision that a proposed abandonment or discontinuance would be in the public interest would not, and *could not*, have been premised on the existence of any such agreement. Thus, the inability of the parties to reach an agreement as to subsidy or purchase during the 6 months following a Commission decision to grant a certificate would not, and *could not*, "change" any "circumstance" which could previously have existed or upon which the Commission might have relied in granting a certificate.

As the Court of Appeals observed (App. 10a-11a), under the Commission's regulations a subsidy offer is not material to the underlying decision whether or not an abandonment would be consistent with the public convenience and necessity, for the Commission's own regulations provide that such an offer will *not* be considered by the Commission "in making its initial findings on the merits of abandonment or discontinuance application[s]" (§1121.38 (h)(3) (*see* App. 10a)). In these circumstances, the Court of Appeals properly recognized that (App. 11a):

> "If the availability of a subsidy cannot properly be considered by the Commission in its initial abandonment or discontinuance decision, it can hardly be a 'changed circumstance' justifying reopening of that decision."

The fact that the Commission in its regulations decided not to consider the possibility of a subsidy offer in reaching a decision whether to approve an abandonment application demonstrates that the Commission is seeking to use its authority to "reopen" an abandonment proceeding not to take account of a "changed circumstance" but rather as a device to "postpone" the issuance of an abandonment certificate beyond the six month period specified in Section 1a(6)(a).[12]

The Commission itself has in effect conceded that Section 1a(6)(a) prohibits it from postponing the issuance of the abandonment certificate for more than six months. As the Court of Appeals recognized, the Commission's Acting Chairman had urged Congress to delete the six-month limitation from the statute in order to grant the Commission "the discretion to extend for a longer period of time the issuance of an abandonment certificate if the circumstances of a particular case make such an additional extension reasonable" (App. 10a n.9). The Commission's construction of Section 1a(6)(a)—and its effort to obtain amendment of that section as so construed—provide additional support for the holding of the Court of Appeals.[13] Although the Commission now asserts a different construction, Congress has declined to adopt it.[14]

[12] The Commission thus errs in asserting that its Petition for Certiorari seeks to confirm "only the traditional authority of an administrative agency . . . to reopen and reconsider a decision in light of substantially changed circumstances material to the original decision" (Petition for Certiorari, pp. 12-13 n.10). The Commission's regulations recognize that the existence or non-existence of a subsidy offer is not "material to the original decision" and, indeed, forbid the consideration of a subsidy offer in the "original decision."

The Court of Appeals' ruling that Section 17(9)(g) provides no basis for reopening an abandonment proceeding if no subsidy agreement is reached during the six month period is further supported by the interpretation placed on that section and Section 1a(6)(a) by the United States Department of Justice and the United States Department of Transportation. Although the United States of America was named a statutory respondent in the review proceed-

[13] The Commission seeks to brush aside its earlier construction of Section 1a(6)(a) on the asserted ground that an agency's requests for statutory changes to expand its authority are inherently unreliable and ambiguous (Petition for Certiorari, pp. 13-14). But the Commission's request for an amendment to the statute was not ambiguous, nor did it represent an effort to eliminate a possible statutory ambiguity, as was the case in *American Trucking Ass'ns, Inc.* v. *Atchison, T. & S.F. Ry. Co.*, 387 U.S. 397 (1967), on which the Commission mistakenly relies.

[14] After the decision of the Court of Appeals, but before the filing of the Petition for Certiorari, the Commission stated before Congress that if Congress wished to restore the Commission's regulations, "it will be necessary to incorporate clarifying provisions" in H.R. 11979, S. 2981, "or in some other appropriate legislation" (Statement of Interstate Commerce Commission Chairman A. Daniel O'Neal Before the Subcommittee on Transportation and Commerce of the House Committee on Interstate and Foreign Commerce (delivered by Rail Services Planning Office Director Alan Fitzwater on July 17, 1978), pp. 8-9, 10; Statement of A. Daniel O'Neal Before the Subcommittee on Surface Transportation of the Senate Committee on Commerce, Science, and Transportation (June 15, 1978), pp. 8-9, 10). Rejecting the Commission's views, Senate Bill 2981, which was intended to "correct several key deficiencies . . . in the existing branch line rehabilitation and service continuation program" (S. Rep. No. 95-1159, 95th Cong., 2d Sess. 1 (1978)), as passed by the Senate on September 23, 1978 (124 Cong. Rec. 15926 (daily ed. Sept. 23, 1978)), makes no change in the six-month limitation contained in Section 1a(6)(a).

ings in the Court of Appeals, the United States Department of Justice, appearing on behalf of the United States, asked the Court of Appeals to hold invalid and set aside the Commission's regulations purporting to authorize the Commission to postpone the issuance of an abandonment certificate by "reopening" the underlying abandonment proceeding. The Department of Justice declined to support the Commission because it concluded that the regulations "clearly and impermissibly conflict with" the provisions of Section 1a (Brief of the United States, filed with the Court of Appeals on July 27, 1977, pp. 10, 12):

> "We submit that the meaning of this express statutory limitation upon the Commission's power to postpone the issuance of a certificate is unambiguous and that the conflicting provisions of the ICC regulations are, accordingly, unlawful and should be set aside."

The Department of Justice disagreed with Commission's reliance on Section 17(9)(g) because "Congress made it clear that the ICC's determination as to whether a rail line could be abandoned was to be made prior to any consideration of subsidies" (Brief of the United States in the Court of Appeals, p. 13).[15]

[15] The United States Department of Transportation had previously objected to the Commission's regulation asserting power to "reopen" an abandonment proceeding on the same ground in the rulemaking proceedings before the Commission (Petition for Reconsideration, filed with the Commission December 10, 1976, pp. 7-8):

> *"The failure or sucess of subsidy negotiations is not, we believe, a changed circumstance* with respect to the need to abandon a particular line or service. By the time subsidy negotiations occur, the Commission has already found that public convenience and necessity require the abandonment, without considering whether there might be parties willing to subsidize the continued operation of the line. *None of the circumstances which affects that decision would be substantially changed* by the success or failure of the subsidy negotiation." (Emphasis supplied.)

The construction given the Act by the Department of Justice and the Department of Transportation further confirms the correctness of the Court of Appeals' holding that the Commission's regulation asserting power to reopen an abandonment proceeding after the expiration of the six month period is contrary to law.[16]

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Attorneys for Railroad Respondents

October 11, 1978

[16] The Commission's Petition for Certiorari appears to be animated by a hypothetical concern that railroads which have secured permission to abandon branch lines might unreasonably refuse to accept an offer from a potential subsidizer to pay for continued service (Petition, p. 10). However, there is no basis, either in logic or experience, for the Commission's concern that a "recalcitrant" railroad (*id.*) might refuse a reasonable offer of financial assistance under which the railroad would be as well or better off than if it proceeded with the proposed abandonment or discontinuance. The Commission's Petition refers to no instance in which such a situation has arisen.

ATTACHMENT A

LIST OF RAILROAD RESPONDENTS

Railroad Respondents herein are:

Atchison, Topeka and Santa Fe Railway Company, The
Boston & Maine Corporation, Debtor—Robert W. Meserve and Benjamin H. Lacy, Trustees
Burlington Northern Inc.
Chicago, Milwaukee, St. Paul & Pacific Railroad Company, Debtor—Stanley E. G. Hillman, Trustee
Chicago and North Western Transportation Company
Chicago, Rock Island & Pacific Railroad Company, Debtor—William M. Gibbons, Trustee
Clinchfield Railroad Company
Consolidated Rail Corporation
Denver and Rio Grande Western Railroad Company, The
Illinois Central Gulf Railroad Company
Louisville & Nashville Railroad Company
Missouri-Kansas-Texas Railroad Company
Missouri Pacific Railroad Company
Norfolk and Western Railway Company
Pittsburgh & Lake Erie Railroad Company
Richmond, Friedericksburg & Potomac Railroad Company
St. Louis-San Francisco Railway Company
Seaboard Coast Line Railroad Company
Soo Line Railroad Company
Southern Pacific Transportation Company
Southern Railway Company
Union Pacific Railroad Company
Western Pacific Railroad Company, The